A

BANK KERJASAMA RAKYAT MALAYSIA BHD v. KOPERASI AMANAH PELABURAN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG J
[CIVIL SUIT NO: WA-22IP-47-11-2017]
6 AUGUST 2019

B

INTELLECTUAL PROPERTY: *Trade marks – Infringement – Whether elements of trade mark infringement proved against defendant – Whether plaintiff expressly or impliedly consented to defendant's use of registered trade marks – Whether defendant could rely on defence under s. 40(1)(dd) of Trade Marks Act 1976 – Whether adverse inference under s. 114(g) of Evidence Act 1950 drawn against plaintiff – Whether plaintiff could claim from defendant for trade mark infringement to certain extent – Trade Marks Act 1976, s. 38(1)(a)*

C

TORT: *Passing off – Misrepresentation – Allegations – Whether proved – Whether defendant committed tort of passing off its services, products and business as those of plaintiff's – Plaintiff's conduct and representations regarding collaboration and participating in defendant's event – Whether plaintiff estopped from claiming from defendant – Whether plaintiff could only claim for tort of passing off after lapse of 14 day period stated in plaintiff's demand*

D

UNINCORPORATED ASSOCIATIONS: *Societies – Co-operative society – Objects, powers and functions of Malaysia Co-operative Societies Commission ('MCSC') – Whether MCSC required to consider disputes between co-operative societies regarding two causes of action (trade mark infringement and tort of passing off) under s. 82(3)(c) of Co-operative Societies Act 1993 – Malaysia Co-operative Societies Commission Act 2007, ss. 4 & 23*

E

CONSTITUTIONAL LAW: *Judicial power – Exercise of judicial power – Court's exclusive judicial power to decide disputes under art. 121(1) of Federal Constitution – Whether s. 82(1)(d), (3)(c), (5) and (7) of Co-operative Societies Act 1993 ('CSA') altered basic structure of Federal Constitution by encroaching into exclusive domain of court's judicial power – Whether s. 82(1)(d), (3)(c), (5) and (7) of CSA invalid under art. 4(1) of Federal Constitution – Whether court has jurisdiction to hear action*

F

G

The plaintiff, an Islamic co-operative bank, was the proprietor of the following four trade marks (four RTMs) registered under the Trade Marks Act 1976 ('TMA'): (i) trade mark with the registration RTM No 165 for goods in Class 16 (paper, cardboard *etc*) ('Class 16 goods'); (ii) trade mark with the registration RTM No 166 for goods in Class 25 (clothing, footwear *etc*) ('Class 25 goods'); (iii) trade mark with the registration RTM 167 for services in Class 35 (advertising, business management, office functions) ('Class 35 services') and (iv) trade mark with the registration RTM 168 for services in Class 36 (insurance, financial affairs *etc*) ('Class 36 services'). In

H

I

this suit ('this action'), the plaintiff claimed that the defendant's website, brochures and promotional materials had infringed the four RTMs under s. 38(1)(a) of the Trade Marks Act 1976 and passed off the defendant's services, products and business as those of the plaintiff's. The defendant submitted that it had used the four RTMs because of a collaboration between the plaintiff and the defendant wherein those who were eligible to be members of the defendant could apply to be the defendant's members through the plaintiff's branches. According to the defendant, the collaboration was announced at the defendant's event on 9 March 2016, a ceremony to hand out dividends to the defendant's members. The following questions arose in this case (i) whether it was appropriate for the defendant to raise a preliminary objection ('PO') to object to the court's jurisdiction to hear this action under s. 82(1)(d), (3)(c), (5) and (7) of the Co-operative Societies Act 1993 ('CSA') only after the completion of the trial of this case; (ii) in view of s. 82(1)(d), (3)(c), (5) and (7) of the CSA, does this court only have jurisdiction to decide this case when (a) the dispute between the plaintiff and the defendant is referred by the plaintiff or defendant to Malaysia Co-operative Societies Commission (MCSC) under s. 82(1)(d) of the CSA; and (b) when MCSC requires the plaintiff and the defendant to refer the dispute to court pursuant to s. 82(3)(c) of the CSA; (iii) if s. 82(1)(d), (3)(c), (5) and (7) of the CSA ousts the court's jurisdiction to hear this action when MCSC does not refer this case to court, whether s. 82(1)(d), (3)(c), (5) and (7) of the CSA had altered the basic structure of the Federal Constitution ('Constitution') regarding the court's judicial power to decide disputes under art. 121(1) of the Constitution; (iv) if s. 82(1)(d), (3)(c), (5) and (7) of the CSA had altered the Constitution's basic structure regarding the court's judicial power to adjudicate disputes pursuant to art. 121(1) of the Constitution, was s. 82(1)(d), (3)(c), (5) and (7) of the CSA invalid under art. 4(1) of the Constitution to the extent of such an alteration; and (v) if the court had jurisdiction to hear this action without any reference by MCSC (a) whether the defendant had infringed the four RTMs under s. 38(1)(a) of the TMA. In this regard, could the defendant rely on a defence under s. 40(1)(dd) of the TMA that the plaintiff had consented, expressly or impliedly, to the defendant's use of the four RTMs; and (b) had the defendant committed a tort of passing off the defendant's services, products and business as those of the plaintiff's? If the defendant had passed off its services, products and business as those of the plaintiff's, whether the plaintiff was estopped from claiming from the defendant based on the tort of passing off because of the plaintiff's conduct and/or representations.

Held (allowing action in part):

(1) The plaintiff and the defendant were not obliged under s. 82(1)(d) of the CSA to refer a dispute which concerned trade mark infringement under s. 38(1)(a) of the TMA and tort of passing off (two causes of action) to MCSC . The MCSC's objects, powers and functions in ss. 4(a) to (c) and 23(a) to (i) of the Malaysia Co-operative Societies Commission Act 2007 ('MCSCA') do not require MCSC to consider disputes between co-operative societies regarding the two causes of action under s. 82(3)(c) of the CSA. Accordingly, by virtue of a purposive interpretation (as provided in s.17A IA) of s. 82 of the CSA read with ss. 4 and 23 of the MCSCA, it was not within MCSC's objects, powers and functions to require the plaintiff and the defendant to refer the dispute concerning the two causes of action to court pursuant to s. 82(3)(c) of the CSA. As such, the court had jurisdiction to hear this action even though (i) the dispute between the plaintiff and the defendant in this action had not been referred by the plaintiff or defendant to MCSC under s. 82(1)(d) of the CSA; and (ii) MCSC did not require the plaintiff and the defendant to refer the dispute to court pursuant to s. 82(3)(c) of the CSA. (paras 15 & 17)

(2) Section 82(1)(d), (3)(c), (5) and (7) of the CSA had altered the basic structure of the Constitution regarding the court's exclusive judicial power to decide disputes under art. 121(1) of the Constitution by encroaching into the exclusive domain of the court's judicial power (encroachment). Section 82(1)(d), (3)(c), (5) and (7) of the CSA is invalid under art. 4(1) of the Constitution to the extent of the encroachment. Accordingly, by reason of the basic structure doctrine which includes the court's exclusive judicial power, the court has jurisdiction to hear this action even though (a) neither the plaintiff nor defendant had referred this case to MCSC pursuant to s. 82(1)(d) of the CSA; and (b) MCSC did not require the plaintiff and defendant to refer this dispute to court in accordance with s. 82(3)(c) CSA and such a decision by MCSC was purportedly final under s. 82(5) and (7) of the CSA. (para 36)

(3) The defendant had not infringed RTM No 166 because of the absence of certain elements but the plaintiff had proved the elements in respect of RTM No. 165, RTM No. 167 and RTM No. 168 (3 RTM's) which were that the defendant had used the three RTM's in the course of trade in the defendant's website, brochures, defendant's application forms and the defendant's event (9 March 2016) to promote the defendant's products and services; the defendant's use of the three RTM's had given rise to a likelihood of confusion/deception between the consumers of

the plaintiff's products and services and the customers of the defendant's products and services; the defendant was neither the registered proprietor nor the registered user of the three RTMs; the defendant had used the three RTMs in respect of the defendant's products and services within the scope of registration of the three RTMs, namely Class 16 goods, Class 35 services and Class 36 services and the defendant had used the three RTMs in such a manner as to render its use likely to be taken either as being used as a trade mark or as importing a reference to the plaintiff or the three RTMs. However, despite the defendant's trade mark infringement regarding the three RTMs, the defendant could rely on a defence under s. 40(1)(dd) of the TMA because the plaintiff had expressly or impliedly consented to the defendant's use of the three RTMs. The plaintiff's employees were involved in the preparation of the defendant's brochures and application forms and emails from the employees of the plaintiff supported the existence of the plaintiff's consent. The plaintiff failed to call the plaintiff's employees to testify in this case and this court was thus constrained to draw an adverse inference against the plaintiff under s. 114(g) of the Evidence Act 1950 for suppressing material evidence. (paras 40-42)

(4) An objective reading of the contents of the plaintiff's press statement on 10 May 2016 did not show that the plaintiff's consent had been withdrawn nor did the plaintiff's press statement state that the defendant infringed the three RTMs. The plaintiff's consent was only withdrawn by the plaintiff's demand. The defendant did not object, let alone reply, to the plaintiff's demand. Accordingly, when the defendant continued to use the three RTMs (despite the plaintiff's demand) such a use constituted trade mark infringement under s. 38(1)(a) of the TMA which commenced on 13 September 2017 (after the expiry of 14 days from the date of the plaintiff's demand). To this extent, the plaintiff could claim from the defendant for TMI regarding the three RTMs. (paras 43 & 44)

(5) Based on the evidence, by using the three RTMs in the defendant's website, brochures and application forms and the defendant's events, the defendant had misrepresented and continued to misrepresent to the public which led the public to believe that *ie* the defendant's products and services are of the same high quality, standard and reliability as the plaintiff's products and services. The defendant had committed a tort of passing off the defendant's services, products and business as those of the plaintiff's. However, the plaintiff was estopped from claiming from the defendant based on the tort of passing off because of the plaintiff's conduct and/or representations regarding the collaboration and the defendant's event (9 March 2016). The plaintiff could only claim for the tort of passing off from 13 September 2017 (after the lapse of the 14 day period stated in the plaintiff's demand). (paras 47 & 50)

Case(s) referred to:

Ah Thian v. Government of Malayia [1976] 1 LNS 3 FC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Habib Bank Ltd v. Habib Bank AG Zurich [1981] 2 All ER 650 ***(refd)***

HK Fong Brainbuilder Pte Ltd v. SG-Maths Sdn Bhd & Ors [2018] 1 LNS 773 HC ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***

Jacobs v. London County Council [1950] AC 361 ***(refd)***

Koperasi Serbausaha Makmur Bhd (KOSMA) v. Jamil Ninggal & Ors [2019] 9 CLJ 600 CA ***(refd)***

Lian Ann Lorry Transport & Forwarding Sdn Bhd v. Govindasamy Palanimuthu [1982] CLJ (Rep) 173 FC ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***

Low Chi Yong v. Low Chi Hong & Anor [2018] 1 CLJ 287 FC ***(refd)***

M Arulandan v. Malaysian Co-operative Insurance Society Ltd [1987] 1 CLJ 43; [1987] CLJ (Rep) 44 SC ***(refd)***

Mark Koding v. PP [1982] 1 LNS 15 FC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

On Bin Long & Ors v. Romeli Dollah [2014] 7 CLJ 371 CA ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Phang Chin Hock v. PP [1979] 1 LNS 67 FC ***(refd)***

PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***

Reckitt & Colman Products Ltd v. Borden Inc & Ors [1990] 1 All ER 873 ***(refd)***

Samuel Frederick Joseph Hogg v. Koperasi Pekerja Jaya Bhd & Another Case [2016] 1 LNS 1265 HC ***(refd)***

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***

Sinma Medical Products (M) Sdn Bhd v. Yomeishu Seizo Co Ltd & Ors [2004] 3 CLJ 815 CA ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

Sungai Lidong Co-operative Land Development Society Ltd v. Lim Jok Teck & Anor [2009] 9 CLJ 264 HC ***(refd)***

Legislation referred to:

Child Act 2001, s. 97(2)

Co-operative Societies Act 1993, ss. 82(1)(d), (3)(c), (5), (7)

Evidence Act 1950, s. 114(g)

Federal Constitution, arts. 4(1), 121(1)

Interpretation Acts 1948 and 1967, ss. 2(1)(a), 17A

Malaysia Co-operative Societies Commission Act 2007, ss. 3(1), 4(a), (b), (c), 23(a), (b), (c), (d), (e), (f), (g), (h), (i)

Rules of Court 2012, O. 12 r. 10(1)(g), O. 14A r. 1(1)(a), (b), O. 18 r. 19(1)(d), O. 33 rr. 2, 5, O. 34 r. 2(2)(k), O. 59 r. 8(b), O. 92 r. 4

Trade Marks Act 1976 (repealed), ss. 38(1)(a), 40(1)(dd)

For the plaintiff - Bahari Yeow Tien Hong, Lim Zhi Zian & Alex Choo Wen Chun; M/s Lee Hishammuddin Allen & Gledhill
For the defendant - Muhammad Farhan Shafee & Wee Yeong Kang; M/s Shafee & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Wong Kian Kheong J:

Background

[1] The plaintiff (plaintiff) and defendant (defendant) are co-operative societies registered under the Co-operative Societies Act 1993 (CSA).

[2] The plaintiff is the proprietor of the following four trade marks (four RTMs) registered under the Trade Marks Act 1976 (TMA):

(i) trade mark with the registration no. 09012165 (RTM No. 165) for goods in Class 16 (goods which include, among others, paper, cardboard, goods made from these materials, printed matters, bookbinding materials, photographs and stationery) (Class 16 goods). A copy of RTM No. 165 is attached to this judgment as "Appendix A";

(ii) trade mark with the registration no. 09012166 (RTM No. 166) for goods in Class 25 (clothing, footwear and headgear) (Class 25 goods). A copy of RTM No. 166 is attached to this judgment as "Appendix B";

(iii) trade mark with the registration no. 09012167 (RTM No. 167) for services in Class 35 (advertising, business management, business administration and office functions) (Class 35 services). A copy of RTM No. 167 is attached to this judgment as "Appendix C"; and

(iv) trade mark with the registration no. 09012168 (RTM No. 168) for services in Class 36 (insurance, financial affairs, monetary affairs and real estate affairs) (Class 36 services). A copy of RTM No. 168 is attached to this judgment as "Appendix D".

The Registrar of Trade Marks has imposed a disclaimer that the registration of the four RTM's shall give no right to the exclusive use of the words "Bank Pilihan Anda" and "Your Choice Bank".

[3] In this suit (this action), the plaintiff claims that the defendant's website, brochures and promotional materials have:

(i) infringed four RTM's under s. 38(1)(a) TMA; and

(ii) passed off the defendant's services, products and business as those of the plaintiff's.

A **Issues**

[4] The following questions arise in this case:

(i) whether it was appropriate for the defendant to object to the court's jurisdiction to hear this action under s. 82(1)(d), (3)(c), (5) and (7) CSA only after the completion of the trial of this case;

B

(ii) in view of s. 82(1)(d), (3)(c), (5) and (7) CSA, does this court only have jurisdiction to decide this case when:

(a) the dispute between the plaintiff and defendant is referred by the plaintiff or defendant to Malaysia Co-operative Societies Commission (MCSC) under s. 82(1)(d) CSA; and

C

(b) when MCSC requires the plaintiff and defendant to refer the dispute to court pursuant to s. 82(3)(c) CSA?;

(iii) if s. 82(1)(d), (3)(c), (5) and (7) CSA ousts the court's jurisdiction to hear this action when MSCS does not refer this case to court, whether s. 82(1)(d), (3)(c), (5) and (7) CSA has altered the basic structure of the Federal Constitution (Constitution) regarding the court's judicial power to decide disputes under art. 121(1) of the Constitution;

D

(iv) if s. 82(1)(d), (3)(c), (5) and (7) CSA has altered the Constitution's basic structure regarding the court's judicial power to adjudicate disputes pursuant to art. 121(1) of the Constitution, is s. 82(1)(d), (3)(c), (5) and (7) CSA invalid under art. 4(1) of the Constitution to the extent of such an alteration?; and

E

F (v) if the court has jurisdiction to hear this action without any reference by MCSC:

(a) whether the defendant has infringed four RTMs under s. 38(1)(a) TMA. In this regard, can the defendant rely on a defence under s. 40(1)(dd) TMA that the plaintiff has consented, expressly or impliedly, to the defendant's use of the four RTMs?; and

G

(b) has the defendant committed a tort of passing off the defendant's services, products and business as those of the plaintiff's? If the defendant has passed off its services, products and business as those of the plaintiff's, whether the plaintiff is estopped from claiming from the defendant based on the tort of passing off because of the plaintiff's conduct and/or representations.

H

Plaintiff's Case

[5] The plaintiff called the following two witnesses in this action:

I

(i) Encik Nizam bin Sani (SP1); and

(ii) Encik Shaharudin bin Mohd. Sa'ad (SP2).

[6] SP1 is the plaintiff's Head of Marketing and Communication. SP1 gave the following evidence, among others:

(i) SP1 is in charge of all press statements made by the plaintiff, including the press statement released on 10 May 2016 (plaintiff's press statement (10 May 2016));

(ii) the plaintiff is established in 1954;

(iii) in 2002, the plaintiff has become a full-fledged Islamic co-operative bank;

(iv) the plaintiff provides, among others, consumer banking services, commercial financing, investment and financial planning services (plaintiff's products and services);

(v) the plaintiff has a Syariah Committee to ensure that all the plaintiff's products and services comply with the Syariah. The plaintiff also continuously conducts research and development to improve the quality of the plaintiff's products and services;

(vi) since 2001, the plaintiff's products and services bear the four RTMs;

(vii) the plaintiff has expended and continues to expend substantial sums of money nationwide to promote the plaintiff's products and services which bear the four RTMs (plaintiff's promotional expenses);

(viii) the defendant has:

(a) infringed four RTMs;

(b) passed off the defendant's products and services (defendant's products and services) as the plaintiff's products and services;

(c) committed the tort of unlawful interference with the plaintiff's business; and

(d) breached the tenancy agreement wherein the plaintiff has let a floor in the plaintiff's building to the defendant (tenancy agreement)

in the following manner:

(1) the defendant's website has used the four RTMs to promote the defendant's products and services;

(2) the four RTMs were printed on the defendant's brochures (which contain application forms for the public to apply to be members of the defendant (defendant's application forms));

(3) in a defendant's event on 9 March 2016 (defendant's event (9 March 2016)), the defendant has used the four RTMs in the backdrop;

(4) the plaintiff received enquiries from the plaintiff's branches on whether the defendant was related to the plaintiff. Hence, the plaintiff's press statement (10 May 2016) has been issued to "advise" (nasihat) the public that the plaintiff has no relationship with the defendant's operations; and

(5) the defendant does not have the plaintiff's permission or approval to use the four RTMs; and

(ix) on 29 August 2017, the plaintiff's then solicitors issued a demand to the defendant to cease the use of the four RTMs (plaintiff's demand) within 14 days from the date of the plaintiff's demand.

[7] SP2 testified as follows, among others:

(i) as the plaintiff's head of co-operative retail business, SP2 supervised, among others, the co-operation between the plaintiff and other co-operative societies (such as the defendant);

(ii) the four RTMs were stated in the defendant's application forms; and

(iii) in the "frequently asked questions" section in the defendant's website, question and answer no. 3 (FAQ 3) states as follows:

Does [Defendant] provide credit facility? …

[Defendant's] collaboration with [Plaintiff] provides all facilities and products that [Plaintiff] has to [Defendant's] members

(emphasis added).

Defendant's Case

[8] The following six witnesses gave evidence for the defendant:

(i) Datuk Mohamed Ilyas bin Pakeer Mohamed (SD1);

(ii) Datuk Mustafha bin Abdul Razak (SD2);

(iii) Puan Siti Norayu bt Mohd Jamil (SD3);

(iv) General (Retired) Tan Sri Abdul Aziz bin Zainal (SD4);

(v) Encik Mohd Fadli bin Bahardin (SD5); and

(vi) Puan Zalina binti Razali (SD6).

[9] SD1 is the founder and Executive Chairman of the defendant. According to SD1, among others:

(i) the defendant was established on 14 November 2014;

(ii) the defendant used four RTMs because of a "collaboration" between the plaintiff and defendant wherein those who were eligible to be members of the defendant, could apply to be the defendant's members through the

plaintiff's branches (collaboration). The collaboration benefited the plaintiff because the plaintiff had gained new customers who applied to be the defendant's members through the plaintiff's branches; and

(iii) the collaboration was announced by SD1 at the defendant's event (9 March 2016), a ceremony to hand out dividends to the defendant's members.

[10] The collaboration is supported by the following evidence:

(i) the testimony of SD2 who is presently the Deputy Chairman of the defendant. From April 2013 until January 2017, SD2 was the plaintiff's Managing Director (MD) at the time of the collaboration;

(ii) the evidence of SD4. SD4 was the plaintiff's Chairman from 16 July 2013 to September 2016;

(iii) SD5 is an Assistant Manager of the defendant. SD5 gave the following evidence, among others:

(a) a working committee on the collaboration (working committee) was formed by the plaintiff and defendant on 13 January 2016;

(b) SD5 was involved in the working committee which met on 19 January 2016 and 27 January 2016;

(c) pursuant to the working committee's meetings, the plaintiff's Business Co-operative Executive, Encik Mohd Azrul Irwan bin Noor Mohamed (Encik Azrul) was tasked to identify the best method or solution to cater for the defendant's application and debiting process; and

(d) Encik Ezrai Hairi bin Kamaruddin (Encik Ezrai), the plaintiff's Business Co-operative Executive, had prepared documents regarding the collaboration, namely, among others, brochures and FAQ; and

(iv) SD6, the defendant's Executive Administrator, testified as follows, among others:

(a) SD6 was involved with the working committee. The communication between the plaintiff and defendant in the working committee was done through SP2; and

(b) the plaintiff was involved in the organization of the defendant's event (9 March 2016). SD6 referred to:

(1) an email dated 29 February 2016 from Encik Noorazhar bin Zakaria (Encik Noorazhar) from the plaintiff's events management section regarding the arrangement for the defendant's event (9 March 2016);

(2) SD6's email dated 8 March 2016 to, among others, Encik Noorazhar; and

(3) an email dated 7 March 2016 from Puan Noor Hafizah bt Mohd Mazni (Puan Noor), the plaintiff's Public Relations and Corporate Branding Executive, which attached an invitation to the mass media to cover the defendant's event (9 March 2016) and for the defendant to "share" the defendant's press release with the plaintiff.

When Objection To Court's Jurisdiction Should Be Raised

[11] After the completion of the trial of this action, the court directed written submission to be filed by parties. After the parties have filed their first submission, by a letter dated 22 October 2018, the defendant for the very first time raised a preliminary objection (PO). According to the PO, by reason of s. 82(1)(d) CSA, the dispute raised in this action should be first referred by the plaintiff or defendant to MCSC and the court only has jurisdiction to hear this action if this case is referred by MCSC to the court under s. 82(3)(c) CSA.

[12] I wish to highlight that a defendant who raises a PO which disputes the court's jurisdiction to hear the case, should resort to the following procedure:

(i) the defendant should enter appearance and apply within the time prescribed for filing a defence under O. 12 r. 10(1)(g) of the Rules of Court 2012 (RC) for a declaration that the court has no jurisdiction to try the suit – please see *HK Fong Brainbuilder Pte Ltd v. SG-Maths Sdn Bhd & Ors* [2018] 1 LNS 773; [2018] 11 MLJ 701, at [22(1)]. Order 12 r. 10(1)(g) RC provides as follows:

> *Dispute as to jurisdiction*
>
> O. 12 r. 10(1) *A defendant who intends to dispute the jurisdiction of the Court in the proceedings* by reason of any irregularity as is mentioned in rule 9 or *on any other ground shall enter an appearance and, within the time limited for serving a defence, apply to the Court for:*
>
> …
>
> (g) *a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action; …*
>
> (emphasis added).

The above procedure is advisable because if a defendant makes an application under O. 12 r. 10(1)(g) RC to declare that the court has no jurisdiction to decide the action in question and if the court allows such an application, much time, effort and costs will be saved; and

(ii) if a defendant does not resort to O. 12 r. 10(1)(g) RC, the defendant should plead in the defence that the court has no jurisdiction to adjudicate the matter (please see the Federal Court's judgment delivered by Salleh Abas FJ (as he then was) in *Lian Ann Lorry Transport & Forwarding Sdn Bhd v. Govindasamy Palanimuthu* [1982] CLJ (Rep) 173; [1982] 2 MLJ 232, at 237} and should resort to the following options:

(a) the defendant may apply to court to strike out the suit under O. 18 r. 19(1)(d) or O. 92 r. 4 RC or pursuant to the court's inherent jurisdiction on the ground that the court has no jurisdiction to hear the case and consequently, the suit constitutes an abuse of court process; and

(b) the defendant may apply to court to decide the entire case on the sole question of whether the court has jurisdiction to hear the case under:

(i) O. 14A r. 1(1)(a) and (b) RC;

(ii) O. 33 r. 2 RC; or

(iii) O. 33 r. 5 RC.

I reproduce below O. 14A r. 1(1)(a), (b), O. 33 rr. 2 and 5 RC:

Determination of questions of law or construction

O. 14A r. 1(1) *The Court may, upon the application of a party* or of its own motion, *determine any question of law* or construction of any document *arising in any cause or matter at any stage of the proceedings where it appears to the Court that:*

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

Time of trial of questions or issues

O 33 r 2 *The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.*

Dismissal of action after decision of preliminary issue

O 33 r 5 *If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.*

(emphasis added)

[13] If a defendant does not follow the procedure as explained in the above para. 12 and only raises a PO regarding the court's lack of jurisdiction to hear the case after a trial or when the case has reached an advanced stage, the court should consider such a conduct by the defendant when the court considers the question of costs – please see O. 59 r. 8(b) RC which provides as follows:

> O. 59 r. 8 *The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account:*
>
> …
>
> (b) *the conduct of all the parties, including conduct before and during the proceedings;* … (emphasis added)

Does This Court Only Have Jurisdiction To Decide This Action If Referred By MCSC?

[14] Section 82 CSA provides as follows:

> *Settlement of disputes*
>
> 82(1) *If a dispute touching the* constitution, by-laws, election of officers, conduct of general meetings, *management or business of a cooperative society arises:*
>
> (a) among members, past members and persons claiming through members, past members and deceased members;
>
> (b) between a member, past member, or person claiming through a member, past member or deceased member, and the co-operative society, its Board, or any officer of the cooperative society;
>
> (c) between the co-operative society or its Board and any officer of the co-operative society; or
>
> (d) *between the co-operative society and any other cooperative society,*
>
> *such dispute shall be referred to the Commission for decision.*
>
> (2) A claim by a co-operative society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member shall be deemed to be a dispute touching the business of the co-operative society within the meaning of subsection (1).
>
> (3) *The Commission may, on receipt of a reference under subsection (1):*
>
> (a) *decide the dispute by itself;*
>
> (b) *refer the dispute to an arbitrator or arbitrators for disposal;*
>
> (ba) *refer the dispute to the tribunal established under section 83;* or
>
> (c) *require the parties concerned to refer the dispute to a court.*
>
> (4) Any party aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Commission within two months from the date of the award and in such manner as may be prescribed in the regulations.

(5) *The decision of the Commission shall be final and shall not be called in question in any civil court.*

(6) The award of the arbitrator or arbitrators under subsection (3) shall, if no appeal is preferred to the Commission under subsection (4) or if such appeal is withdrawn or abandoned, be final and shall not be called in question in any civil court.

(7) *The decision of the Commission or the award of the arbitrator or arbitrators which, by virtue of subsections (5) and (6), is final shall be enforced by the Sessions Court having jurisdiction over the place where the registered office of the co-operative society is situated in the same manner as if the decision or award had been a judgment of such Sessions Court.*

(8) Any party aggrieved by the decision of the court on any dispute referred to it under paragraph (3)(c) may appeal therefrom in accordance with the provisions of the rules of court applicable thereto.

(emphasis added)

[15] According to the PO, the court can only have jurisdiction to hear this action if:

(i) the dispute between the plaintiff and defendant is referred by the plaintiff or defendant to MCSC under s. 82(1)(d) CSA; and

(ii) MCSC requires the parties to refer the dispute to court pursuant to s. 82(3)(c) CSA.

I am not able to accept the PO due to the following reasons:

(a) the phrase "dispute touching the … management or business of a cooperative society" in s. 82(1) CSA has been construed by Nallini Pathmanathan JCA (as she then was) in the Court of Appeal in *Koperasi Serbausaha Makmur Bhd (KOSMA) v. Jamil Ninggal & Ors* [2019] 9 CLJ 600, at [1] and [2] as follows:

[1] This appeal arises from the decision of the High Court dated 16 June 2016 dismissing the appellant's application for judicial review. In their application, the appellant, a co-operative society named Koperasi Serbausaha Makmur ('Kosma'), had sought orders of certiorari as well as declaratory relief pertaining to the decision of the Suruhanjaya Koperasi, the third respondent ('the Commission') to refer the complaints of the respondents ('the respondents') of wrongful dismissal and defamation, to a tribunal ('tribunal') to be adjudicated upon. …

[2] The singular points of significance in this appeal relate to the following issues:

…

(ii) This turns on the construction to be accorded to section 82(1) (CSA), more particularly the phrase "a dispute touching on the management or business" of the co-operative society, Kosma. The precise issue requiring determination is whether the phrase "a dispute touching on the management or business"

includes the settlement or adjudication of disputes relating to the wrongful termination of employment of co-operative society employees, as in the case with the respondents here.

(iii) The High Court, relying on the Supreme Court decision of M. Arulanandan v. Malaysian Co-operative Insurance Society Ltd [1987] CLJ Rep 44; [1987] 1 CLJ 43; [1987] 1 MLJ 485 ('Arulanandan'), held that the 'dispute', namely the complaints of wrongful termination by the respondents, fell within the ambit of the phrase "a dispute touching on the management or business". The effect of the High Court's decision was to find that the 3rd Respondent is clothed with jurisdiction to determine or adjudicate upon claims of wrongful termination of employment by officers and/or employees of Kosma. Accordingly Kosma's judicial review application, which was premised on the contention that the Commission had no such jurisdiction or power, failed. The dispute was to be determined by a tribunal set up pursuant to a recommendation by the Commission to the Minister under section 83 [CSA];

(iv) We determined and held otherwise, namely that the complaints of wrongful termination or unfair dismissal of employment of the respondents do not fall within the purview of the phrase "dispute touching on the management or business" of the co-operative society. The net result of our decision was to hold that the Commission did not possess jurisdiction over disputes of this nature. It was not therefore empowered to either deal with the dispute itself, or to refer the dispute to the tribunal established under s. 83(1) of the Act to resolve or adjudicate upon the dispute.

(v) We reached this decision for a few reasons. First, we concluded that the facts of the present case are distinguishable from Arulanandan because in that case the employee lodged a grievance in respect of disciplinary action taken against him by the co-operative society. However his employment was never terminated and he remained at all times an officer of the co-operative society/company. He only sought relief against disciplinary action. To that extent, the case was distinguishable.

(vi) We were further persuaded by the fact that Arulanandan was decided (particularly in relation to the interpretation to be accorded to the phrase "dispute touching on the management or business") by reliance on the Madras High Court decision of Madhava Rao v. Surya Rao AIR [1954] Mad 103 ('Madhava Rao'). In that case, the Indian equivalent provision of our section 82(1)(c), (in pari materia with our provision) was accorded a wide or broad construction. Adopting the same approach, the Supreme Court led by Wan Suleiman SCJ, determined by a majority, that the phrase was to be broadly construed. George Seah SCJ dissented.

(vii) It was held that the dispute relating to whether the disciplinary procedures implemented by the Chief Executive amounted to a contravention of the relevant co-operative regulations, was a domestic dispute. It related to the internal administration of the co-operative society. The phrase "dispute touching the business of a registered society" was therefore wide enough to accommodate such a dispute, and it should be referred to the then Registrar General of Co-operative Societies under the then section 49(1) of the Co-operative Societies Act 1948.

(viii) It is clear that in Arulanandan, the dispute related to domestic or internal disciplinary proceedings. Arulanandan's grievance was against the imposition of the proceedings and the punishment meted out. But Arulanandan did not leave the employ of the co-operative society. He remained an officer, even after the disciplinary proceedings. To that extent it is clear that his grievance with regards to his employment remained an internal matter of the co-operative society. The adoption of a 'broad' approach in the construction of the words "touching ... the management or business" of a co-operative society to encompass a domestic disciplinary proceeding is, with great respect, entirely correct.

(ix) Another relevant point worth mention is that the Indian High Court case of Madhava Rao which prescribed that a broad construction be accorded to the phrase "touching the business of a registered society" had in fact been overruled by the Indian Courts in the case of Co-operative Central Bank Ltd & Ors v. Additional Industrial Tribunal, Andhra Pradesh, Hyderabd [1970] AIR 245 ('Co-operative Central Bank'). In Co-operative Central Bank, the learned judges relied in turn upon an Indian Supreme Court decision namely Deccan Merchants Co-operative Bank Ltd v. M/s Dalichand Jugraj Jain and Ors [1969] AIR ('Deccan Merchants') where the Supreme Court of India determined that a narrow construction or definition was to be accorded to the phrase "touching on the business".

(x) The word 'dispute' it was reasoned, was subject to a limitation, namely, to disputes capable of being resolved by the registrar. As the dispute in question in Deccan Merchants was between a landlord and tenant, it was doubtful that that the word 'dispute' in the equivalent Indian legislation relating to co-operatives, encompassed such a matter. There was specific legislation to deal with a landlord and tenant dispute.

(xi) In like manner we were of the view that in Malaysia the Industrial Relations Act 1967 provides specific legislation dealing with disputes pertaining to unfair dismissal. To that extent we were of the view, with the greatest of respect, that the phrase "touching on the business" and "dispute" in section 82(1)(c) ought to be accorded a narrow construction or definition, as it did not appear to be within the contemplation of the legislature to confer jurisdiction on the 3rd Respondent to adjudicate upon, and grant reliefs such as reinstatement or arrears of wages, in respect of grievances of unfair dismissal. This more properly fell within the regime of the Industrial Relations Act 1967.

(xii) We therefore allowed Kosma's appeal, set aside the decision of the High Court and allowed the application for judicial review. The net consequence of our decision is that the Commission's decision to refer the respondents' dispute to such a tribunal is quashed. The Commission acted ultra vires or in excess of its jurisdiction in making such a reference because it was not, on our construction of section 82(1)(c), conferred by Parliament with the jurisdiction to refer a dispute relating to wrongful dismissal of officers of a co-operative society to a tribunal for adjudication. Such a dispute is not a domestic or internal matter of the co-operative. (emphasis added).

Based on *Koperasi Serbausaha Makmur*, at [2(x)], I am of the view that the plaintiff and defendant are not obliged under s. 82(1)(d) CSA to refer a dispute which concerns trade mark infringement under s. 38(1)(a) TMA and tort of passing off (two causes of action) to MCSC because MCSC has no capability to decide the two causes of action;

(b) in the Court of Appeal case of *On Bin Long & Ors v. Romeli Dollah* [2014] 7 CLJ 371, at [10]-[14], Anantham Kasinather JCA decided as follows:

> *[10] In our judgment, the answer to this appeal is provided in the decision of the Supreme Court in the case of Co-operative Central Bank Ltd v. Sri Devi Lekshmy Amma [1990] 1 CLJ 714; [1990] 1 CLJ (Rep) 72. The facts of this case are that a co-operative society granted a loan to a member of the society. The loan was secured by way of a charge created in favour of the lender by the wife of the member. Following default on the part of the member in the repayment of the loan, the co-operative society sought to foreclose the charged property. The non-member wife challenged the right of the co-operative society to foreclose by contending that:*
>
> > *She was not liable until the breach by the member of the co-operative society had been determined and that until the breach had been established, any action against the respondent was pre-mature.*
>
> *[11] According to the borrower husband, his liability to the co-operative society for the outstanding loan could only be determined by the Co-operative Commission pursuant to s. 49 of the Co-operative Societies Act 1948. The contention that the foreclosure claim was premature was therefore premised on the husband member's liability not having been determined by the Co-operative Commission. Incidentally s. 49 is the precursor to s. 82 (CSA), the provision which is relevant in this appeal. Counsel for the co-operative society urged the Supreme Court in this case to follow the interpretation adopted by the Indian Court in the case of Deccan Merchants Co-operative Bank Ltd v. M/s Dalichand Jugray Jain & Ors AIR [1969] SC 1320 when considering the equivalent section in the Indian legislation. The rationale for this submission being that, the origin for the provision in both jurisdictions had as its source the English Friendly Society Act 1922.*
>
> [12] The Supreme Court of India in the case of *Deccan Merchants Co-operative Bank Ltd v. M/s Dalichand Jugray Jain & Ors* (*supra*) in construing the word 'dispute' under s. 54 of the Bombay Co-operative Societies Act 1925 the equivalent of our s. 49 stated:
>
> (a) One other limitation on the word 'dispute' may also be placed and that is that the word 'dispute' covers only those disputes which are capable of being resolved by the Registrar or his nominee. It seems to us very doubtful that the word 'dispute' would include a dispute between a landlord society and a tenant when the landlord society has not been set up for the purpose of construction or buying and letting out houses …
>
> …

[13] Based on the pronouncements of the Supreme Court of India on the construction to be placed on the word 'dispute' in the equivalent provision in the Indian Legislation, Lee Hun Hoe CJ (Borneo) (as His Lordship then was) opined that the foreclosure of the charge by the co-operative society without awaiting the disposal of the co-operative societies' claim against the husband member was not premature since the charge created an independent obligation. The significance of the pronouncements of Lee Hun Hoe CJ to this appeal is His Lordship's pronouncement that another ground why the word "dispute" did not include foreclosure proceedings was:

fourthly, only the Courts have the powers to make the order for sale.

[14] Applying the principle of law enunciated by the Supreme Court in Co-Operative Central Bank to the facts of our case, in our judgment, the learned trial judge was right in rejecting the prayers sought by the appellant in Civil Suit No. 22NCVC-124-5-2012 because it is trite that the Co-operative Commissioner is not clothed with any jurisdiction to deal with the tortious claim for defamation that the respondent successfully pursued in the said suit. Accordingly, in our judgment, the respondent was right in filing his claim for reinstatement as a member with the Co-operative Commission but filing his claim for defamation with the ordinary court of law by way of the said civil suit. Secondly, in our opinion, the defamatory material contained in the various resolutions moved by the appellants and subsequently incorporated in the reports of the co-operative society cannot conceivably, to use the words of the Supreme Court of India in Deccan Merchants Co-operative Bank Ltd v. M/s Dalichand Jugray Jain & Ors (supra) "relate to a transaction in which the member must be interested as a member".(emphasis added)

On Bin Long, at [12(a)], [13] and [14], adopt the same interpretation of the term "dispute" in s. 82(1) CSA as in *Koperasi Serbausaha Makmur*. According to *On Bin Long*, parties are only bound to refer a "dispute" to MCSC pursuant to s. 82(1) CSA if MCSC has the capability to decide such a "dispute". It is clear that MCSC has no capability to decide the "dispute" in this action concerning the two causes of action;

(c) MCSC has no jurisdiction and power to grant the following relief for the two causes of action:

(1) damages;

(2) account of profits;

(3) injunction to restrain trade mark infringement and tort of passing off; and/or

(4) mandatory injunction to destroy products and materials which constitute trade mark infringement and tort of passing off; and

(d) MCSC is established by s. 3(1) of Malaysia Co-operative Societies Commission Act 2007 (MCSCA). The construction of s. 82 CSA taken in *Koperasi Serbausaha Makmur* and *On Bin Long*, in my view, is

supported by a purposive interpretation of s. 82 CSA and the objects, powers and functions of MCSC as provided in ss. 4 and 23 MCSCA. Sections 4 and 23 MCSCA provide as follows:

Objects of [MCSC]

4. The objects of [MCSC] are to:

(a) foster sound and orderly development of co-operative societies and the co-operative sector in accordance with co-operative values and principles to contribute towards achieving the socio-economic objectives of the nation;

(b) promote a financially sound, progressive and resilient co-operative sector; and

(c) maintain confidence in the co-operative movement.

Powers and functions of [MCSC]

23. [MCSC] shall have all powers, functions and duties imposed on it under this Act, [CSA] or any other written law, and without prejudice to the generality of the foregoing, [MCSC] shall also have the following functions:

(a) to promote and maintain stability of the co-operative sector;

(b) to be responsible for the surveillance, supervision and regulation of co-operative societies and the co-operative sector;

(c) to encourage and promote sound and orderly development of co-operative societies and the co-operative sector;

(d) to foster co-operative values and principles;

(e) to create a conducive environment for co-operative societies to carry out their activities;

(f) to register and revoke the registration of co-operative societies;

(g) to act as trustee and to manage any scheme of Islamic financing or credit facility set up by the Government of Malaysia for co-operative societies;

(h) to advise the Minister on all matters relating to co-operative societies and the co-operative sector; and

(i) to carry out any function under any written law as may be prescribed by the Minister by notification published in the Gazette.

(emphasis added)

Part I of the Interpretation Acts 1948 and 1967 (IA) applies to interpret CSA and MCSCA because both these statutes are enacted after 18 May 1967 – please see s. 2(1)(a) IA. Section 17A IA (in Part 1 IA) provides as follows:

Regard to be had to the purpose of Act

17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. (emphasis added)

Section 17A IA has been applied by Haidar CJ (Malaya), Steve Shim CJ (Sabah & Sarawak) and Gopal JCA (as he then was) in the Federal Court case of *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265, at pp. 272-276, 298-300.

MCSC's objects, powers and functions in ss. 4(a) to (c) and 23(a) to (i) MCSCA do not require MCSC to consider disputes between co-operative societies regarding the two causes of action under s. 82(3)(c) CSA. Accordingly, by virtue of a purposive interpretation (as provided in s. 17A IA) of s. 82 CSA read with ss. 4 and 23 MCSCA, it is not within MCSC's objects, powers and functions to require the plaintiff and defendant to refer the dispute concerning the two causes of action to court pursuant to s. 82(3)(c) CSA.

The above purposive construction of s. 82 CSA is supported by the long title to CSA which reads as follows:

An Act to make provisions for the constitution, registration, control and regulation of co-operative societies; to promote the development of co-operative societies in accordance with the co-operative values of honesty, trustworthiness and transparency in order to contribute towards achieving the socioeconomic objectives of the nation and for matters connected therewith.

(emphasis added)

[16] The following cases are distinguishable from this case (regarding a dispute between two co-operative societies in respect of the two causes of action) because these cases concern disputes between co-operative societies and their members regarding the internal affairs of the co-operative societies:

(i) the majority decision of the Supreme Court delivered by Wan Hamzah SCJ in *M. Arulandan v. Malaysian Co-operative Insurance Society Ltd* [1987] 1 CLJ 43; [1987] CLJ (Rep) 44; [1987] 1 MLJ 485;

(ii) Yew Jen Kie JC's (as she then was) judgment in the High Court case of *Sungai Lidong Co-operative Land Development Society Ltd v. Lim Jok Teck & Anor* [2009] 9 CLJ 264; and

(iii) Rozana Ali Yusoff JC's (as she then was) decision in the High Court in *Samuel Frederick Joseph Hogg v. Koperasi Pekerja Jaya Bhd & Another Case* [2016] 1 LNS 1265.

[17] Premised on the reasons elaborated in the above para. [15], I have no hesitation to dismiss the PO with costs because MCSC has no jurisdiction, power and capability under s. 82(3)(c) CSA read with ss. 4 and 23 MCSCA to require this case regarding the two causes of action to be referred to court. As such, the court has jurisdiction to hear this action even though:

(i) the dispute between the plaintiff and defendant in this action has not been referred by the plaintiff or defendant to MCSC under s. 82(1)(d) CSA; and

(ii) MCSC does not require the plaintiff and defendant to refer the dispute to court pursuant to s. 82(3)(c) CSA.

Whether Section 82 CSA Has Altered Basic Structure Of Constitution

[18] In the event that s. 82(1)(d), (3)(c), (5) and (7) CSA ousts the court's jurisdiction to hear this action when MSCS does not require the plaintiff and defendant to refer this case to court, I will now discuss whether s. 82(1)(d), (3)(c), (5) and (7) CSA has altered the basic structure of the Constitution regarding the court's judicial power to decide disputes under art. 121(1) of the Constitution.

Supremacy Of Constitution

[19] Article 4(1) of the Constitution provides as follows:

> *Supreme law of the Federation*
>
> *4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.* (emphasis added)

[20] Article 4(1) of the Constitution provides for the supremacy of the Constitution as explained by Suffian LP in the Federal Court in *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112, at 113:

> *The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.*
>
> *Under our Constitution written law may be invalid on one of these grounds:*
>
> (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or
>
> (2) *in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or*
>
> (3) in the case of State written law, because it is inconsistent with Federal law, article 75.

The court has power to declare any Federal or State law invalid on any of the above three grounds. The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.
(emphasis added)

[21] *Ah Thian* has been affirmed by the Federal Court in a judgment delivered by Zainun Ali FCJ in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561, at [78].

Position Before Sivarasa's Case

[22] I will discuss whether our courts have recognised the doctrine of basic structure of the Constitution (basic structure doctrine) before and after the Federal Court's judgment given by Gopal Sri Ram FCJ in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, at [7] and [8].

[23] In *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187, at 189-190, Raja Azlan Shah FJ (as His Majesty then was) held as follows in the Federal Court:

Counsel for the appellant before us urged that any amendment affecting the fundamentality of the Constitution should be avoided at all costs. According to him that part of the Constitution must not be touched. In my view, a distinction must be made between those parts of the Constitution which the framers thought should not suffer change and those that can be changed.

…

It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with "power of formal amendment". They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later. …

As fundamental rights are not the same as ordinary rights, they can only be suspended or abridged in the special manner provided for it in the Constitution. In my opinion, the purpose of enacting a written Constitution is partly to entrench the most important constitutional provisions against repeal and amendment in any way other than by a specially prescribed procedure. …

…

The framers of our Constitution have incorporated fundamental rights in Part II thereof and made them inviolable by ordinary legislation. Unless there is a clear intention to the contrary, it is difficult to visualise that they also intended to make those rights inviolable by constitutional amendment. Had it been intended to save

those rights from the operation of clause (3) of Article 159, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. I am inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of fundamental rights by the legislative and executive organs of the State by means of laws, rules and regulations made in exercise of legislative power and not the abridgment of such rights by amendment of the Constitution itself in exercise of the power of constitutional amendment. That power, though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise can only be made after "mature consideration by Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws."

There have also been strong arguments in support of a doctrine of implied restrictions on the power of constitutional amendment. A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.

I concede that Parliament can alter the entrenched provisions of clause (4) of Article 5, to wit, removing the provision relating to production before the magistrate of any arrested person under the Restricted Residence Enactment as long as the process of constitutional amendment as laid down in clause (3) of Article 159 is complied with. When that is done it becomes an integral part of the Constitution, it is the supreme law, and accordingly it cannot be said to be at variance with itself. …

…

This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government. This is so because the Federation of Malaya, and later, Malaysia, began with the acceptance of the Constitution by the nine Malay States and the former Settlements of Penang and Melaka, by the acceptance of it by Sabah and Sarawak that entered the Federation in 1963, as "the supreme law of the Federation …" (clause 1 of Article 4). It is thus the most vital working document which we created and possess. If it is urged that the Constitution is on the same level with ordinary law, then the Constitution is an absurd attempt on the part of the framers, to limit a power, in its own nature illimitable. In the context of clause (1) of Article 160, "law" must be taken to mean law made in exercise of ordinary legislative power and not made in exercise of the power of constitutional amendment under clause (3) of Article 159, with the result that clause (1) of Article 4 does not affect amendments made under clause (3) of Article 159.

In conclusion, I hold that clause (4) of Article 5 is nothing but a constitutional protection which can be taken away or abridged only in the manner in which the Constitution provides. There is a world of difference between legislative immunity and a constitutional guarantee. The Constitution, by its very nature, creates the distinction. A constitutional guarantee cannot be wiped out by a simple legislative process as opposed to constitutional amendment. (emphasis added).

[24] It is clear that Raja Azlan Shah FJ has expressly rejected the basic structure doctrine in *Loh Kooi Choon*. Such a rejection was however not shared by Wan Sulaiman FJ in *Loh Kooi Choon*, at p. 193, as follows:

> *I do not feel that the issue before this court would call for my view on whether there are indeed inherent or implied limitations to the power of amendment under Article 159, and must perforce confine myself to the issue before us viz. is the amendment to the fundamental right set out in Article 5 by Act A354/76 constitutional? Nor do I feel called upon to answer the broader issue of whether the power to amend includes the power to abrogate a fundamental right.* (emphasis added).

[25] According to the *stare decisis* doctrine, the *ratio decidendi* of a case decided by more than one judge, consists of one or more rules of law applied to the issue(s) (raised by the material facts of the case) by all or a majority of the judges – please see the judgment of Lord Simonds in the House of Lords in *Jacobs v. London County Council* [1950] AC 361, at 369-370. In *Loh Kooi Choon*, the third member of the Federal Court, Ali FJ, had passed on before the delivery of the judgment. Since Raja Azlan Shah FJ's rejection of the basic structure doctrine was not shared by Wan Sulaiman FJ in *Loh Kooi Choon*, I am of the respectful view that such a rejection does not form part of the *ratio decidendi* of *Loh Kooi Choon*.

[26] In *Phang Chin Hock v. Public Prosecutor* [1979] 1 LNS 67; [1980] 1 MLJ 70, at 71, 72, 74 and 75, Suffian LP delivered the following judgment of the Federal Court:

> *Thus there are three issues here.*
>
> …
>
> *Secondly, if Parliament have power to make constitutional amendments that are inconsistent with the Constitution, do they have power to make amendments that destroy the basic structure of the Constitution?*
>
> *Thirdly, have sections 2(4), 9(3) and 12 of Act 216 destroyed the basic structure of the Constitution and are they therefore void?*
>
> …
>
> If it is correct that amendments made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words, Article 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite. If our Constitution makers had intended that their successors should not in any way alter their handiwork, it would have been perfectly easy for them to so provide; but nowhere in the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbour such intention. On the contrary apart from Article 159, there are many provisions showing that they realised that the Constitution should be a living document intended to be workable between the partners that constitute the Malayan (later Malaysian) policy, a living document that is reviewable from time to time in the light of experience and, if need be, amended.

In our judgment, in construing Article 4(1) and Article 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in Article 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in Article 4(1); only such law must be consistent with the Constitution.

In other words, in our judgment the position here is the same as that declared in India by the Supreme Court in 1951 in *Shankari Prasad Singh Deo & Ors v. The Union of India & Ors* AIR 1951 SC 458 and in 1965 in *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845.

…

Mr. Sidhu referred us to decisions of the Indian Supreme Court in *IC Golak Nath & Ors v. State of Punjab* [1967] 2 SCR 762; AIR 1967 SC 1643; and *Kesavananda Bharati v. State of Kerala* [1973] SCR Supp 1; AIR 1973 SC 1461 as being persuasive authority for the proposition that Parliament cannot destroy the basic structure of the Constitution.

These two cases were considered by this court in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187. With respect we agree with Raja Azlan Shah FJ, as he then was, …

…

For the reasons which will appear when we deal with the third point in a moment, it is unnecessary for us to say whether or not Parliament's power of constitutional amendment extends to destroying the basic structure of the Constitution. For the purpose of this appeal it is enough for us merely to say that Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself.

…

In our judgment Parliament has not by section 12 encroached on the judicial power of the courts and the section is perfectly valid. …

…

Finally, whatever the features of the basic structure of the Constitution may be, it is our view that none of the amendments complained of and none of the impugned provisions of Act 216 have destroyed the basic structure of the Constitution; and it is for this reason that we find it unnecessary to express our view on the question whether or not Parliament has power to so amend the Constitution as to destroy its basic structure.

To summarise, our answers to the three issues raised are: first, Parliament have power to make constitutional amendments that are inconsistent with the Constitution. Secondly, Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding

manner and form prescribed by the Constitution itself and it is unnecessary for us to say whether or not Parliament's power of constitutional amendment extends to destroying the basic structure of the Constitution. Thirdly, Act 216 is constitutional. Whatever may be the features of the basic structure of the Constitution, none of the constitutional amendments complained of and none of the impugned provisions of Act 216 have destroyed the basic structure of the Constitution. (emphasis added).

[27] I am of the respectful view that the Federal Court in *Phang Chin Hock* has not rejected the basis structure doctrine. In any event, *Phang Chin Hock* does not concern an Act of Parliament which deprives the court of its judicial power to decide disputes under art. 121(1) of the Constitution.

[28] The Federal Court in a judgment given by Suffian LP in *Mark Koding v. Public Prosecutor* [1982] 1 LNS 15; [1982] 2 MLJ 120, at 121 and 123, decided as follows:

The questions referred to us are three as follows:

…

(2) *As a Member of Parliament, is the Accused's right of free speech in Parliament given by Article 63(2) of the Constitution either (a) part of the basic structure of the Constitution* or (b) a fundamental rule of natural justice, *so that any purported amendment of the Constitution seeking to limit such right is void and of no effect?*

…

Question 2.

(a) *We did not consider it necessary to decide the question whether or not the constitution may be so amended as to destroy its basic structure; and in any event, we did not consider that the accused's right of free speech in Parliament given by Article 63(2) of the Constitution forms part of the basic structure of the Constitution.*

…

As regards the argument that the amendments complained of affected the basic structure of the constitution and are therefore unconstitutional, with great respect to Mr. Heald, we have no difficulty in holding that they do not; and it was therefore unnecessary for us to consider the question whether or not Parliament has power to so amend the constitution as to alter its basic structure whatever that may be.
(emphasis added)

It is clear that in *Mark Koding*, the Federal Court has not considered the application or non-application of the basic structure doctrine.

[29] In *PP v. Kok Wah Kuan* [2007] 6 CLJ 341; [2008] 1 MLJ 1, at [3], [13], [14], [17], [18], [21], [22] and [28], Abdul Hamid Mohamad PCA (as he then was) delivered a 4-1 majority judgment of the Federal Court as follows:

A [3] *From the judgment of the Court of Appeal, it can be seen that that court had arrived at that conclusion on the following premises:*

(i) *the doctrine of separation of powers is an integral part of the Constitution;*

(ii) *judicial power of the Federation vests in the courts;*

B (iii) by s. 97(2) of the Child Act, Parliament had consigned the power to determine the measure of the sentence that was to be served to the Yang di-Pertuan Agong in the case of an offence committed in the Federal Territories, or to the Ruler or the Yang di-Pertua Negeri, if the offence is committed in the State.

C (iv) by virtue of art 39 [Constitution], the executive authority of the Federation vests in the Yang di-Pertuan Agong who, in accordance with art 40 of the Constitution, must act in accordance with the advice given by the Cabinet or particular minister of the Cabinet;

(v) *therefore, s 97(2) of the Child Act contravenes the doctrine of separation of powers housed in the Constitution by consigning to the Executive the judicial*
D *power to determine the measure of the sentence to be served by the appellant.*

…

[13] What about the instant appeal? In the instant appeal, even the Court of Appeal's judgment does not, indeed cannot, show which provision of the Constitution s. 97 is inconsistent with. Instead the court held that that section violated the doctrine
E *of the separation of powers, which, in its view was an integral part of the Constitution.*

[14] What is this doctrine of separation of powers? Separation of powers is a term coined by French political enlightenment thinker Baron de Montesquieu. It is a political doctrine under which the legislative,
F executive and judicial branches of government are kept distinct, to prevent abuse of power. The principle traces its origins as far back as Aristotle's time. During the Age of Enlightenment, several philosophers, such as John Locke and James Harrington, advocated the principle in their writings, whereas others such as Thomas Hobbes strongly opposed it. Montesquieu was one of the foremost supporters of the doctrine. His
G writings considerably influenced the opinions of the framers of Constitution of the United States. There, it is widely known as 'checks and balances'. Under the *Westminster* System this separation does not fully exist. The three branches exist but Ministers, for example, are both executives and legislators. …

H …

[17] *In other words we have our own model. Our Constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out*
I *on the ground that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even*

though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy. …

[18] *So, in determining the constitutionality or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah F.J. (as His Royal Highness then was) quoting Frankfurter J said in Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 (FC) said: 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.'*

…

[21] *Now that the pre-amendment words are no longer there, they simply cannot be used to determine the validity of a provision of a statute. The extent of the powers of the courts depends on what is provided in the Constitution. In the case of the two High Courts, they 'shall have such jurisdiction and powers as may be conferred by or under federal law.' So, we will have to look at the federal law to know the jurisdiction and powers of the courts.* (In the case of the Federal Court and the Court of Appeal, part of their jurisdiction is specifically provided in the Constitution itself – see art 121(1B) and (2) respectively).

[22] So, even if we say that judicial power still vests in the courts, in law, the nature and extent of the power depends on what the Constitution provides, not what some political thinkers think 'judicial power' is. Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. That is the limit of judicial power of the court imposed by law. It further provides that, instead, the child shall be ordered to be detained in a prison during the pleasure of the Yang di-Pertuan Agong or the Ruler or the Yang Di-Pertua Negeri, depending on where the offence was committed. That is the sentencing power given by federal Law to the court as provided by the Constitution. Similarly, in some cases, federal law provides for death sentence, in others, imprisonment and/or fine, some are mandatory and some are discretionary. The Legislature provides the sentences, the court imposes it where appropriate.

…

[28] *On these grounds I would allow the appeal, set aside the order of the Court of Appeal and reinstate the order of the High Court.*

(emphasis added).

[30] It is clear that the majority decision in *Kok Wah Kuan* has rejected the basic structure doctrine regarding the encroachment into judicial power by s. 97(2) of the Child Act 2001. Richard Malanjum CJ (Sabah & Sarawak) (as he then was) only dissented in *Kok Wah Kuan*, at [33], [34], [36] and [37], regarding the extent of the court's judicial power:

[33] *On plain reading of sub-s. (2) of s. 97 it is clear that it empowers the court, after convicting a person who was a child at the time of commission of an offence punishable with death, to make an alternative order instead of imposing a sentence of death. In my view the alternative power to make such an order as provided for*

A *by the subsection is no less than the power of the court to impose a sentence or punishment on a child convict albeit in a different form, namely, to the care of the Yang di-Pertuan Agong or to the Ruler or to the Yang di-Pertua Negeri depending on where the offence was committed.*

[34] *Hence, with respect I do not think there is anything unconstitutional in the* B *scheme since it is still the court that makes the order consequential to its conviction order. In my view when the court makes the order it is carrying out the process of sentencing which is generally understood to mean a process whereby punishment in accordance with established judicial principles is meted out by the court after a conviction order has been made following a full trial or a guilty plea* (see *Public Prosecutor v. Jafa bin Daud* [1981] 1 MLJ 315; *Standard Chartered Bank & Ors* C *v. Directorate of Enforcement & Ors* AIR 2005 SC 2622). …

...

[36] *For the above reason I do not think it is thus necessary for me to deal with those constitutional points highlighted by the Court of Appeal in coming to its decision.*

D

[37] *At any rate I am unable to accede to the proposition that with the amendment of art 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure* E *that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.* (emphasis added)

Sivarasa's Case And Subsequent Development

[31] The Federal Court decided in *Sivarasa*, at [7] and [8], as follows:

F [7] *The third and final observation is in respect of the sustained submission made on the appellant's behalf that the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that Parliament cannot enact laws (including Acts amending the Constitution) that violate the basic structure. A frontal attack was launched on the following observation of the former Federal Court in Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187: …

G [8] *It was submitted during argument that reliance on the Vacher case was misplaced because the remarks were there made in the context of a country whose Parliament is supreme. The argument has merit. As Suffian LP said in Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112: …

This earlier view was obviously overlooked by the former Federal Court when it H *followed Vacher's case.* Indeed it is, for reasons that will become apparent from the discussions later in this judgment, that the courts are very much concerned with issues of whether a law is fair and just when it is tested against art. 8(1). *Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the* I *Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on*

a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See, Keshavananda Bharati v. State of Kerala AIR [1973] SC 1461.
(emphasis added)

[32] *Sivarasa* has been affirmed by the Federal Court in *Semenyih Jaya*, at [79]-[81]. Significantly, *Semenyih Jaya*, at [82], [84] and [86]-[91], has recognised that a feature of the Constitution's basic structure is the court's judicial power to decide disputes:

[82] *The authority of Liyanage and Others v. Reginam [1966] 1 All ER 650; [1967] 1 AC 259 probably summed up the concept concisely. The Privy Council in Liyanage held that the impugned legislation involving a usurpation and infringement by the Legislature of judicial powers is inconsistent with the written Constitution of Ceylon which, while not in terms vesting judicial functions in the Judiciary, manifested an intention to secure in the Judiciary a freedom from political, legislative and Executive control and in effect left untouched the judicial system established by the Charter of Justice of 1833. The legislation was struck down as void.*

…

[84] *Thus given the strong observations made on the true nature and purpose of the impugned enactment, any alterations made in the judicial functions would tantamount to a grave and deliberate incursion in the judicial sphere.*

…

[86] *Thus to put it in perspective, the judicial power of the court resides in the Judiciary and no other as is explicit in art. 121(1) of the Constitution.*

[87] *The principles laid down in Kesavananda Bharati v. State of Kerala AIR 1973 SC 146 were reviewed and affirmed by the Supreme Court in Indira Nehru Gandhi v. Shri Raj Narain & Anor AIR 1975 SC 2299. The Supreme Court emphasised the sanctity of the doctrine of separation of powers and the exclusivity of judicial power. …*

[88] *The Judiciary is thus entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers.*

[89] *This is essentially the basis upon which rests the edifice of judicial power.*

[90] *The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.*

[91] *The concepts above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus an effective check and balance mechanism is in place to ensure that the Executive and the Legislature act within their constitutional limits and that they uphold the rule of law. The Malaysian apex court had prescribed that the powers of the Executive and the Legislature are limited by the Constitution and that the Judiciary acts as a bulwark of the Constitution in ensuring that the powers of the Executive and the Legislature are to be kept within their intended limit (see Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135).* (emphasis added)

[33] *Semenyih Jaya* is followed by the Federal Court in *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors & Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545. Zainun Ali FCJ decided as follows in *Indira Gandhi*, at [36], [38], [45], [47], [51] and [52] (CLJ); [42], [44], [51], [53], [57] and [58] (MLJ):

> [36] *The Federal Court in Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat and Another Case [2017] 3 MLJ 561) has put beyond a shadow of doubt that judicial power is vested exclusively in the High Courts by virtue of art 121(1). Judicial independence and the separation of powers are recognised as features in the basic structure of the Constitution. The inherent judicial power of the civil courts under art 121(1) is inextricably intertwined with their constitutional role as a check and balance mechanism: …*
>
> …
>
> *[38] That judicial power is vested exclusively in the Judiciary is implicit in the very structure of a Westminster model constitution itself, whether or not such vesting is expressly stated (Hinds and others v. The Queen; Director of Public Prosecutions v. Jackson; Attorney General of Jamaica (intervener) [1977] AC 195 (at p 213)). …*
>
> …
>
> *Significance of judicial review as part of the basic structure*
>
> *[45] The significance of the exclusive vesting of judicial power in the Judiciary, and the vital role of judicial review in the basic structure of the constitution, is twofold. First, judicial power cannot be removed from the civil courts. The jurisdiction of the High Courts cannot be truncated or infringed. Therefore, even if an administrative decision is declared to be final by a governing statute, an aggrieved party is not barred from resorting to the supervisory jurisdiction of the court. The existence of a finality clause merely bars an appeal to be filed by an aggrieved party.*
>
> …
>
> *[47] Secondly, judicial power cannot be conferred on any other body whose members do not enjoy the same level of constitutional protection as civil court judges do to ensure their independence. 'Parliament cannot just declare formally that a new court is a superior court or shares the rank of being at the apex of the judicial hierarchy; the test is substantive, requiring an examination of the composition and powers of the new court' (see Semenyih Jaya and also Thio Li-Ann, A Treatise on Singapore Constitutional Law (2012: Singapore, Academy Publishing) at 10.054).*
>
> …
>
> *[51] The conferment of judicial functions on bodies other than courts, thus understood, is an incursion into the judicial power of the federation. …*
>
> *[52] It would be instructive to now distil the principles as have been illustrated above:*
>
> *(a) under art 121(1) [Constitution], judicial power is vested exclusively in the civil High Courts. The jurisdiction and powers of the courts cannot be confined to federal law. The courts will continually and inevitably be engaged in the interpretation and enforcement of all laws that operate in this country and any other source of law recognised by our legal system;*

(b) judicial power in particular the power of judicial review, is an essential feature of the basic structure of the Constitution;

(c) features in the basic structure of the Constitution cannot be abrogated by Parliament by way of constitutional amendment;

(d) judicial power may not be removed from the High Courts; and

(e) judicial power may not be conferred upon bodies other than the High Courts, unless such bodies comply with the safeguards provided in Part IX of the Constitution to ensure their independence. (emphasis added)

Section 82(1)(d), (3)(c), (5) And (7) Has Encroached Into Judicial Power

[34] As explained above, there are conflicting decisions of our apex court on the application of the basic structure doctrine. On the one hand, the Federal Court in *Kok Wah Kuan* has rejected the basic structure doctrine. On the other hand, there is a trilogy of Federal Court judgments in *Sivarasa*, *Semenyih Jaya* and *Indira Gandhi* which has applied the basic structure doctrine.

[35] In the Federal Court case of *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645; [1998] 1 MLJ 1, at 14, Peh Swee Chin FCJ has held that when there are conflicting decisions of the Federal Court, the subsequent Federal Court decision should prevail over the earlier Federal Court decision. This is the first reason for me to adopt the approach expounded by the later Federal Court cases of *Sivarasa*, *Semenyih Jaya* and *Indira Gandhi*. There is a second reason for me to apply the later approach decided by the Federal Court – I am attracted to the reasoning regarding the basic structure doctrine which upholds the rule of law and protects fundamental liberties.

[36] Based on *Sivarasa*, *Semenyih Jaya* and *Indira Gandhi*, if s. 82(1)(d), (3)(c), (5) and (7) CSA has the effect that the court can only have jurisdiction to hear this action when MSCS requires the plaintiff and defendant to refer this case to the court, I am of the following view:

(i) s. 82(1)(d), (3)(c), (5) and (7) CSA has altered the basic structure of the Constitution regarding the court's exclusive judicial power to decide disputes under art. 121(1) of the Constitution by encroaching into the exclusive domain of the court's judicial power (encroachment); and

(ii) s. 82(1)(d), (3)(c), (5) and (7) CSA is invalid under art. 4(1) of the Constitution to the extent of the encroachment. Accordingly, by reason of the basic structure doctrine which includes the court's exclusive judicial power, the court has jurisdiction to hear this action even though:

(a) neither the plaintiff nor defendant has referred this case to MCSC pursuant to s. 82(1)(d) CSA; and

(b) MCSC does not require the plaintiff and defendant to refer this dispute to court in accordance with s. 82(3)(c) CSA and such a decision by MCSC is purportedly final under s. 82(5) and (7) CSA.

A **Plaintiff Is Confined To Two Causes Of Action**

[37] SP1 and SP2 have given evidence that in addition to the two causes of action, the defendant has committed the tort of unlawful interference with the plaintiff's business and the defendant has breached the tenancy agreement (two additional causes of action). The plaintiff cannot rely on the two B additional causes of action because:

(i) the plaintiff's statement of issues to be tried did not include the two additional causes of action. Order 34 r. 2(2)(k) RC requires parties to file their statements of issues to be tried, preferably a statement of agreed issues to be tried; C

(ii) the plaintiff's summary of case did not allude to the two additional causes of action; and

(iii) the plaintiff is estopped by its statement of issues to be tried and summary of case from relying on the two additional causes of action – please see the judgment of Gopal Sri Ram JCA (as he then was) in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, at 294-297. D

Trade Mark Infringement (TMI)

E *Five Elements Of TMI*

[38] The relevant parts of ss. 38(1)(a) and 40(1)(dd) TMA are reproduced below:

38. Infringement of a trade mark

F *(1) A registered trade mark is infringed by a person who, not being the registered proprietor of the trade mark or registered user of the trade mark using by way of permitted use, uses a mark which is identical with it or so nearly resembling it as is likely to deceive or cause confusion in the course of trade in relation to goods or services in respect of which the trade mark is registered in such a manner as to render the use of the mark likely to be taken either -*

G *(a) as being use as a trade mark; …*

…

Acts not constituting infringement

40(1) Notwithstanding anything contained in this Act, the following acts do not H *constitute an infringement of a trade mark -*

…

(dd) the use by a person of a trade mark in relation to goods or services to which the registered proprietor or registered user has at any time expressly or impliedly consented to; … (emphasis added). I

[39] In the Federal Court case of *Low Chi Yong v. Low Chi Hong & Anor* [2018] 1 CLJ 287; [2017] 6 MLRA 412, at [35]-[37], Suriyadi Halim Omar FCJ has explained the five elements of TMI under s. 38(1)(a) TMA (five elements) as follows:

(i) the defendant has used a trade mark (X mark) which so nearly resembles the plaintiff's RTM as to cause a likelihood of confusion or deception (likelihood of confusion/deception) between the consumers of the plaintiff's goods or services (goods/services) and the defendant's goods/services (first element);

(ii) the defendant is neither the registered proprietor nor the registered user of the plaintiff's RTM (second element);

(iii) the defendant has used X mark in the course of trade (third element);

(iv) the defendant has used X mark on the defendant's goods/services within the scope of registration of plaintiff's RTM (fourth element); and

(v) the defendant has used X mark in such a manner as to render its use likely to be taken either as being used as a trade mark or as importing a reference to the plaintiff or the plaintiff's RTM (fifth element).

Whether Defendant Has Committed TMI

[40] Firstly, the defendant cannot infringe RTM No. 166 because the defendant's business and products do not fall within Class 25 goods. As such, the first and fourth elements are not fulfilled as regards RTM No. 166.

[41] I find as a fact that the plaintiff has proven the five elements in respect of RTM No. 165, RTM No. 167 and RTM No. 168 (three RTMs). This decision is based on the following evidence and reasons:

(i) the defendant has used the three RTMs in the course of trade in the defendant's website (eg. FAQ 3), brochures, defendant's application forms and the defendant's event (9 March 2016) to promote the defendant's products and services. Hence, the third element has been proven by the plaintiff;

(ii) the defendant's use of the three RTMs has given rise to a likelihood of confusion/deception between the consumers of the plaintiff's products and services and the customers of the defendant's products and services. According to SP1, the plaintiff had received enquiries from the plaintiff's branches on whether the defendant was related to the plaintiff. The first element is therefore satisfied in this case;

(iii) the second element is fulfilled because the defendant is neither the registered proprietor nor the registered user of the three RTMs;

(iv) the defendant has used the three RTMs in respect of the defendant's products and services within the scope of registration of the three RTMs, namely Class 16 goods, Class 35 services and Class 36 services. This constitutes proof of the fourth element; and

(v) the fifth element is satisfied when the defendant has used the three RTMs in such a manner as to render its use likely to be taken either as being used as a trade mark or as importing a reference to the plaintiff or the three RTMs.

[42] Despite the defendant's TMI regarding the three RTMs, I am of the view that the defendant can rely on a defence under s. 40(1)(dd) TMA because the plaintiff has expressly or impliedly consented to the defendant's use of the three RTMs (plaintiff's consent). The plaintiff's consent is clear from the following evidence:

(i) all the six defence witnesses, namely SD1 to SD6, gave mutually corroborative testimonies regarding the collaboration. At the material time, SD2 was the MD of the plaintiff while SD4 was its Chairman;

(ii) the working committee was formed regarding the collaboration. In fact, the working committee had met and discussed matters regarding the collaboration;

(iii) the following facts regarding the defendant's event (9 March 2016) support the giving of the plaintiff's consent:

(a) SD1 announced at the defendant's event (9 March 2016) regarding the collaboration in the presence of SD2 and SD4 without any objection from SD2 and SD4. The above public announcement by SD1 had been reported – please see a printout of Berita Harian online news dated 9 March 2016;

(b) the plaintiff provided technical equipment (microphones and public address system), technical assistance, tables and chairs for the defendant's event (9 March 2016);

(c) the plaintiff's employees assisted in the organisation and design of the backdrop for the defendant's event (9 March 2016); and

(d) the defendant's event (9 March 2016) was held at the plaintiff's building;

(iv) the plaintiff's employees were involved in the preparation of the defendant's brochures and defendant's application forms; and

(v) emails from the following five employees of the plaintiff (plaintiff's employees) supported the existence of the plaintiff's consent:

(a) Encik Azrul;

(b) Encik Ezrai;

(c) Encik Noorazhar;

(d) Puan Noor; and

(e) Puan Kalthom bt. Ali.

Despite the defendant's production of relevant emails of the plaintiff's five employees, the plaintiff did not call the plaintiff's five employees to testify in this case. Nor did the plaintiff adduce any reason why the plaintiff's five employees could not have given evidence in this action. In the circumstances, this court is constrained to draw an adverse inference against the plaintiff under s. 114(g) of the Evidence Act 1950 for suppressing material evidence which may be given by the plaintiff's five employees in this case – please see Mohd. Azmi SCJ's judgment in the Supreme Court case of *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, at 494.

[43] I have not overlooked the plaintiff's press statement (10 May 2016) which states as follows:

[PLAINTIF] NASIHAT ORANG RAMAI AGAR TIDAK KELIRU SIARAN MEDIA

…

10 Mei 2016

[Plaintif] sebagai bank koperasi Islam terbesar di negara ini, hari ini mengumumkan bahawa [Plaintif] tidak mempunyai kaitan dengan operasi [Defendan].

Sebagai sebuah institusi perbankan, [Plaintif] melaksanakan kerjasama strategik dengan pelbagai pihak bagi memberi perkhidmatan nilai tambah kepada anggota dan pelanggannya. Menerusi inisiatif dengan [Defendan], [Plaintif] hanya terlibat sebagai ejen yang menguruskan pendaftaran anggota [Defendan] menerusi cawangan [Plaintif].

Justeru orang ramai dinasihatkan agar tidak keliru tentang hubungan antara [Plaintif] dengan [Defendan] kerana kedua-duanya merupakan entiti yang melaksanakan urusan perniagaan yang berbeza. (emphasis added)

I am of the view that an objective reading of the contents of the plaintiff's press statement (10 May 2016) does not show that the plaintiff's consent has been withdrawn. Nor did the plaintiff's press statement (10 May 2016) state that the defendant had infringed the three RTMs.

[44] The plaintiff's consent is only withdrawn by the plaintiff's demand. It is to be noted that the defendant did not object, let alone reply, to the plaintiff's demand. Accordingly, when the defendant continued to use the three RTMs (despite the plaintiff's demand), such a use constituted TMI under s. 38(1)(a) TMA which commenced on 13 September 2017 (after the expiry of 14 days from the date of the plaintiff's demand). To this extent, the plaintiff can claim from the defendant for TMI regarding the three RTMs.

Has Defendant Committed A Tort Of Passing Off?

[45] One of the tests of passing off has been laid down by Lord Oliver in the House of Lords in *Reckitt & Colman Products Ltd v. Borden Inc & Ors* [1990] 1 All ER 873, at 880 (Lord Oliver's test). Lord Oliver's test consists of the following three elements:

(i) the plaintiff has goodwill attached to goods/services which the plaintiff supplies in the mind of the purchasing public by association with the get-up, brand name, trade description or features of labelling or packaging (which is distinctive of the plaintiff's goods/services);

(ii) the defendant has misrepresented to the public which leads or is likely to lead the public to believe that the defendant's goods/services are the goods/services of the plaintiff; and

(iii) the plaintiff must prove that he suffers, or in a *quia timet* action, he is likely to suffer damage by reason of the defendant's misrepresentation.

[46] Lord Oliver's test has been applied by Malaysian courts. Suffice if for me to quote Nik Hashim JCA's (as he then was) judgment in the Court of Appeal case of *Sinma Medical Products (M) Sdn Bhd v. Yomeishu Seizo Co Ltd & Ors* [2004] 3 CLJ 815, at [33].

[47] Applying Lord Oliver's test, this court is satisfied that the defendant has passed off the defendant's services, products and business as those of the plaintiff's. This decision is premised on the following evidence and reasons:

(i) the plaintiff has goodwill attached to its business (plaintiff's goodwill) in the mind of the public by association with the three RTMs which are distinctive of the plaintiff's business. The plaintiff's goodwill is clear from the following:

(a) according to the plaintiff's financial reports for 2016, the plaintiff's profit for that year was about RM1.6 billion;

(b) the plaintiff is the largest Islamic co-operative bank in Malaysia; and

(c) substantial sums for the plaintiff's promotional expenses have been incurred to promote the plaintiff's goodwill;

(ii) by using the three RTMs in the defendant's website (eg. FAQ 3), brochures, defendant's application forms and the defendant's event (9 March 2016), the defendant has misrepresented and continue to misrepresent to the public which leads or is likely to lead the public to believe that:

(a) the defendant's products and services, like the plaintiff's products and services, have complied with the Syariah;

(b) the defendant's products and services are of the same high quality, standard and reliability as the plaintiff's products and services;

(c) the defendant's products and services have been licensed, approved or permitted by the plaintiff; and

(d) the defendant's services, products and business are related to or affiliated with the plaintiff and/or the plaintiff's services, products and business

(defendant's misrepresentation); and

(iii) the plaintiff has suffered and continues to suffer damage and loss by reason of the defendant's misrepresentation.

[48] I am of the view that the plaintiff's conduct and/or representations to the defendant as explained in the above sub-paras. 42(i) to (v), estops the plaintiff from claiming for the tort of passing off. In United Kingdom's Court of Appeal case of *Habib Bank Ltd v. Habib Bank AG Zurich* [1981] 2 All ER 650, at 667-668, Oliver LJ (as he then was) upheld the High Court's dismissal of a passing off suit on the ground of estoppel. *Habib Bank* has been cited with approval by our Federal Court in *Boustead Trading*, at p. 293.

[49] When the plaintiff's demand is sent to the defendant, the plaintiff has ceased to represent to the defendant that the defendant can use the three RTMs. In such circumstances, the plaintiff is no longer estopped from claiming for the tort of passing off against the defendant. Accordingly, I allow this action for passing off only to the extent that the tort of passing off is committed by the defendant with effect from 13 September 2017 (after the expiry of 14 days from the date of the plaintiff's demand).

Court's Decision

[50] A summary of this decision is as follows:

(i) the PO is dismissed with costs because:

(a) MCSC has no jurisdiction, power and capability under s. 82(3)(c) CSA read with ss. 4 and 23 MCSCA to require this case regarding the two causes of action to be referred to court. Accordingly, the court has jurisdiction to hear this action even though:

A (1) the dispute between the plaintiff and defendant has not been referred by the plaintiff or defendant to MCSC under s. 82(1)(d) CSA; and

(2) MCSC does not require the plaintiff and defendant to refer the dispute to court pursuant to s. 82(3)(c) CSA; and

B (b) if s. 82(1)(d), (3)(c), (5) and (7) CSA has the effect of ousting the court's jurisdiction to hear this action when MCSC does not require the plaintiff and defendant to refer the dispute to court, s. 82(1)(d), (3)(c), (5) and (7) CSA:

C (1) has altered the basic structure of the Constitution regarding the court's exclusive judicial power to decide disputes under art. 121(1) of the Constitution; and

(2) is invalid under art. 4(1) of the Constitution to the extent of such an alteration of the Constitution's basic structure; and

D (ii) if the court has jurisdiction to hear this action even though MCSC does not require the plaintiff and defendant to refer the dispute to court under s. 82(3)(c) CSA:

(a) the defendant has not infringed RTM No. 166 because of the E absence of the first and fourth elements;

(b) the defendant has infringed three RTMs under s. 38(1)(a) TMA. In this regard:

F (1) the defendant can rely on the plaintiff's consent as a defence under s. 40(1)(dd) TMA up to 12 September 2017 (the last day of the 14-day period given in the plaintiff's demand); and

(2) the defendant's TMI for the three RTMs would commence on 13 September 2017 (after the expiry of the 14-day period stipulated in the plaintiff's demand); and

G (c) the defendant has committed a tort of passing off the defendant's services, products and business as those of the plaintiff's. However, the plaintiff is estopped from claiming from the defendant based on the tort of passing off because of the plaintiff's conduct and/or representations regarding the collaboration and the defendant's H event (9 March 2016). The plaintiff can only claim for the tort of passing off from 13 September 2017 (after the lapse of the 14-day period stated in the plaintiff's demand).

[51] Premised on the above evidence and reasons, this action is only partially allowed as follows:

I

(i) the defendant has only infringed the three RTMs and passed off the defendant's services, products and business as those of the plaintiff's with effect from 13 September 2017; and

(ii) regarding costs, subject to an allocatur fee:

(a) the defendant shall pay costs to the plaintiff for the dismissal of the PO; and

(b) the defendant is only liable for three-quarter of the costs of this action because the plaintiff is only partially successful in this case.